

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 07 April 2005

BALCA Case No.: 2004-INA-32
ETA Case No.: P2003-CT-01332213

In the Matter of:

DIGITEK VISIONS LLC,
Employer,

on behalf of

GEETA ALOUSIOUS,
Alien.

Certifying Officer: Raimundo A. Lopez
Boston, Massachusetts

Appearance: Kamal K. Rastogi, Esquire
New York, New York
For the Employer and the Alien

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification¹ filed by Digitek Visions LLC (“the Employer”) on behalf of Geeta Alousious (“the Alien”) for the position of Secretary. (AF 52-61).² The following decision is based on the record upon which the Certifying Officer (“CO”) denied certification and the Employer’s request for review, as contained in the Appeal File (“AF”), and any written arguments. 20 C.F.R. § 656.27(c).

¹ Alien labor certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

² “AF” is an abbreviation for “Appeal File.”

STATEMENT OF THE CASE

The Employer in this case described its business on the ETA 750A as a "Software Consulting Firm and Health Care Employment Agency." (AF 53). On April 23, 2001 the Employer filed an application for alien employment certification on behalf of the Alien for the position of Bilingual Secretary. (AF 52). From the rebuttal documentation, it appears that the Secretary's work would relate to the provision of nursing services to various hospitals, nursing homes and private households. (AF 21). The minimum job requirements included two years of college and three years of experience in the job offered or the related occupation of either "office manager, technical assistant, [or] secretary, etc." The duties included "communicating with people in Hindi and other South Indian languages." Other special requirements in box 15 included "good interpersonal communication skill in English and more than one Indian language." On June 26, 2002, the Employer filed a request for conversion to reduction in recruitment ("RIR") processing. (AF 41-47). The State Workforce Agency therefore transferred the application to the CO May 2, 2003. (AF 36-37).

On May 23, 2003, the CO issued a Notice of Findings ("NOF") proposing to deny certification on the basis that the Employer's listed job requirements were unduly restrictive and that the Employer had failed to proffer sufficient documentation to establish a business necessity. (AF 32-35). The Employer exceeded the two-year Specific Vocational Preparation ("SVP"), as set forth in the Dictionary of Occupational Titles ("DOT") for the position of secretary, as the Employer's minimum requirements indicated a combined total of five years. Additionally, unless adequately documented as a business necessity, the job requirement of a language other than English violated 20 C.F.R. § 656.21(b)(2)(i)(C). The CO gave the Employer the opportunity to amend the ETA 750A and to re-advertise the position. The CO also requested that the Employer document the number of current employees who meet the restrictive language requirement. On June 24, 2003, the Employer submitted a request for a forty-five day extension, which was subsequently granted on June 25, 2003.

On August 7, 2003, the Employer filed a rebuttal to the NOF in which it amended the ETA 750A and reported on the results of a new recruitment effort. The Employer removed the two years of college requirement, reduced the years of required experience from three to two years, and added Hindi as a required language, thereby making the language requirement English, Hindi, and at least one additional South Indian language. The new recruitment failed to produce any U.S. applicants. The Employer asserted that the language requirement is a business necessity, and therefore is not unduly restrictive. (AF 17-26). The Employer stated that most of their clients are Indian and these clients' relatives speak only Hindi or another South Indian language. The Employer concluded by stating that the position was previously filled by a multilingual employee and the Employer would prefer to fill the vacancy with another multilingual candidate. Attached to the Employer's rebuttal was a list of the names and addresses of twenty-nine "clients and prospective clients." (AF 24-26).

On October 24, 2003, the CO issued a Final Determination ("FD") denying certification on the ground that the Employer "failed to provide sufficient documentary evidence to support the business necessity for more than one Indian language." (AF 16). The CO found that the restrictive language requirement neither bears a reasonable relationship to the occupation in the context of the Employer's business, nor is it essential to performing the job duties. The CO noted that the Employer's client list failed to provide a percentage of how many of these current and potential clients do not speak English, thereby making it impossible to figure out what percentage of the employee's time would be devoted to using the required foreign languages out of necessity, as opposed to preference. The CO stated that while the Employer may be a provider of nursing services and a secretary may provide information to clients, a secretary "most likely would not be the person who figures out [the client's] problems and provides the proper nursing services." *Id.*

On November 20, 2003, the Employer filed a Request for Review and the matter was docketed in this Office on January 13, 2004. The Employer's Request for Review

argued that the restrictive language requirement was not unduly restrictive, but was rather a business necessity. (AF 2-13).

DISCUSSION

It is unlawful for a job opportunity to include a requirement for a language other than English unless that requirement is adequately documented as arising from business necessity. 20 C.F.R. § 656.21(b)(2)(i)(C). If the employer fails to meet this requirement, the minimum job requirements specified by the employer on the ETA 750A are presumptively unduly restrictive. *Id.* This squarely places the burden on the employer to show business necessity.

The business necessity standard of *Information Industries*, 1988-INA-82 (Feb. 9, 1989) (*en banc*) is applicable to a foreign language requirement. First, it must be determined whether a foreign language requirement is shown to bear a reasonable relationship to the **occupation itself**, in the context of employer's business. Second, it must be determined whether the foreign language is essential to perform, in a reasonable manner, the **job duties** as described by the employer. *Lucky Horse Fashion, Inc.*, 1997-INA-182 (Aug. 22, 2000) (*en banc*); *Coker's Pedigreed Seed Co.*, 1988-INA-48 (Apr. 19, 1989) (*en banc*).³

The job in question, "Secretary" is found under Occupational Code 201.362-030 of the Dictionary of Occupational Titles. There is nothing in this definition that establishes a relationship between the job of Secretary and the ability to communicate with clients in several languages. Accordingly, the context of the Employer's business is crucial to establishing prong one of the *Information Industries* business necessity test. According to the Board's decision in *Lucky Horse Fashion, Inc.*, *supra*,

³ The Employer cited the ruling of *Ratnayake v. Mack*, 499 F.2d 1207 (8th Cir. 1974), in its argument before the CO for the proposition that business necessity may be established if the job requirement is shown to be reasonable and tends to contribute to or enhance the efficiency and quality of the business. *Ratnayake*, however, was considered by the Board in formulating the *Information Industries* test. The Board rejected that standard, observing that none of the parties in that case, including AILA as *amicus*, argued that *Ratnayake* should be the standard for establishing business necessity.

"[c]ommunication in a foreign language with 'clients, contractors and customers' may clearly be related to the occupation itself, as in *Coker's Pedigreed Seed Company*, (*supra*), if a substantial portion of the employer's business involves speaking the language."

The Appeal File, as it existed prior to the issuance of the Final Determination by the CO, contains only a small amount of detail about the Employer's business. Digitek was established in 1997, and later expanded to include a health care personnel agency and over 20 employees. (AF 45). According to an affidavit from the worker who previously filled the Secretary position, she would talk to nursing services customers, who are principally from the Indian community, in Hindi or other South Indian languages. (AF 23). According to the Employer's President and CEO "Most of our clients are Indians and their parents and relatives speak only Hindi or South Indian language. Whenever they call for Nursing Services if some one is not familiar with their language it becomes [a] problem to understand their problem and to provide proper nursing services." (AF 21). The Employer's rebuttal included a list of twenty-nine clients and prospective clients.

Here, the Employer's documentation to show that its business is to provide nursing services to a predominantly Indian community is minimal, consisting wholly of the Employer's own statements, the affidavit of a former worker, and a list of 29 clients and prospective clients. An employer's mere assertions are inadequate documentation. *Lamplighter Travel Tours*, 1990-INA-64 (Sept. 10, 1991). Vague and incomplete rebuttal documentation will not meet the employer's burden of establishing business necessity. *Analysts International Corporation*, 1990-INA-387 (July 30, 1991). Essentially, the Employer is asking the Department of Labor to simply believe its word that its business serves a customer base of which a substantial portion cannot communicate adequately in English. Although this may be an accurate reflection of the Employer's business, the proof offered is inadequate.

Neither does the Employer's documentation establish the second prong of the *Information Industries* business necessity test: proof that the foreign language is essential to perform, in a reasonable manner, the job duties as described by the employer. In this case, the ETA 750A indicates that the Secretary would handle typical Secretarial work such as handling and typing office correspondence; handling phone calls, faxes and e-mails; filing documents; preparing work schedules for other employees; helping the President/CEO with office work; and keeping accounts of the income and expenses. One of the listed duties is "communicating with people in Hindi and other South Indian language." Presumably, this communication would relate to the duty of handling telephone, fax and e-mail communications.

The Employer here has failed to provide the requisite information to successfully rebut the NOF and therefore has failed to establish that the foreign language requirement is a business necessity. The NOF stated that the Employer's rebuttal must document:

(1) The total number of clients/people the employer deals with and the percentage of those people that the employer deals with who cannot communicate in English, (2) Identify the specific nature of employer's business and the percentage of his/her business that is dependent upon the languages, (3) Document and describe how absence of the language would adversely impact business, (4) The percentage of time a worker would use the language by necessity rather than choice... (7) Any other documentation which will clearly show that fluency in more than one Indian language is essential to the employer's business.

(AF 34). The Employer has merely made several self-serving assertions without providing any supporting documentation. The Board in *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*) held that "written assertions which are reasonably specific and indicate their sources or bases shall be considered documentation. This is not to say that a CO must accept such assertions as credible or true; but he/she must consider them in making the relevant determination and give them the weight that they rationally deserve."

In this case, the only evidence submitted before the CO to establish that communication in languages other than English was essential to perform the duties was

(1) the Employer's own statement that the parents and relatives of their customers often could not speak English, (2) the former incumbent's affidavit that she spoke to customers in Hindi or other South Indian language, and (3) a list of current and potential customers.

The Employer's statement does not state that its clients cannot communicate in English, but only that their parents and relatives cannot. The former incumbent's affidavit establishes that she spoke to callers in Hindi and other South Indian languages, but does not state whether such means of communication was necessary or merely a convenience, nor whether a high percentage of callers needed to communicate in this way. The list of current and potential customers is only a list of names and addresses -- it in no way contains information establishing that those customers needed to communicate with the Employer's secretary in either Hindi or another South Indian language.

Thus, it was rational for the CO in this case to reject the Employer's assertions as “a bare assertion without either supporting reasoning or evidence is generally insufficient to carry an employer’s burden of proof.” *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*); *see also Washington International Consulting Group*, 1987-INA-625 (June 3, 1988) (*en banc*) (holding written assertions, although documentation that must be considered, need not be credited by a CO where they lack underlying support).

In the Employer's request for Board review, the Employer's attorney asserted that “most of [the Employer's] clients (about 90%) are from the Asian Indian community” and 75% of these clients “are not very good in [sic] English.” He also argues that the Secretary's duties include making the first contact with such clients and that more than 40% of her time is spent handling such contacts or calling them back to arrange proper services. (AF 4). This argument was not presented to the CO, and therefore cannot be considered by this Board on review. *Import S.H.K. Enterprises, Inc.*, 1988-INA-52 (Feb. 21, 1989) (*en banc*). Moreover, it is not supported by any underlying documentation.

This case came before the CO as a request for conversion to RIR processing. This panel has held that when the CO denies an RIR, such denial should result in the remand

of the application to the local job service for regular processing. *Compaq Computer Corp.*, 2002-INA-249-253, 261 (Sept. 3, 2003). In this case, however, the CO permitted the Employer to re-advertise as part of its rebuttal, which opportunity the Employer took. Accordingly, the Employer was provided supervised recruitment at the CO level, mooted the need for a remand to the local job service.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.